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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 850

JACK COLE COMPANY, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ALABAMA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

FRANCIS H. HARE,
Counsel for Appellant.

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In opposition to the motion of appellees to affirm this cause, appellant submits that the contents of the record itself is a sufficient answer and in addition thereto appellant directs the attention of the court to the following.

In the case of *Howard Hall Company* v. *United States*, 315 U. S. 495, this court reversed the commission.

Appellee contends that the reversal had no application to geographical scope of operations but only to commodities.

After such reversal of the *Howard Hall* case, the commission on November 22, 1944, in Number MC-42318 rewrote the operating rights of Howard Hall with the most drastic and radical changes in the geographical scope of operations, following a further hearing.

The condition under the title "Grandfather Application" stated:

> "The essential facts presented at the initial and further hearings in this proceeding will be considered, and

conclusions drawn therefrom will be in conformity with the principles announced by the Supreme Court in the *Howard Hall case* and *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, hereinafter called the *Carolina case*, referred to therein."

Under the title "Base Territory," Howard Hall on a record similar to ours sought, as we do, a base territory of 100 miles. Hall's former commission order gave him 12 miles and gives us 15. "In conformity with the principles announced by the Supreme Court in the Howard Hall case" the commission in Hall's new order gave him a new base territory "including all points in Alabama within 65 miles of and including Birmingham and Montgomery."

Under the title "Findings" the commission in the *Howard Hall* case has granted him a vast increase in geographical scope, which can only accurately be delineated by examining the order itself.

It seems to us idle to say that the decision of this Court in the *Howard Hall* case *as interpreted by the commission itself* is without application to geographical scope or operation. On almost parallel records the present Jack Cole operating order and the new Howard Hall operating order cannot co-exist.

We realize that this is not the stage of the proceeding to brief the case at length but it should suffice to show that this Court should not affirm the cause, but should take the record under submission, and at that point we can undertake to furnish this record with a brief which will demonstrate the merits of the appeal.

This appeal presents a substantial question and it is therefore respectfully submitted that the motion to affirm should be overruled.

FRANCIS H. HARE,
Attorney for Appellant.